Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1661

J. L. SIMMONS COMPANY, INC., et al.,

Petitioners,

vs.

THE STATE OF ILLINOIS and JOHN E. SARBAUGH, Chief, Midwest Office, Antitrust Division of the United States Department of Justice,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT THE STATE OF ILLINOIS IN OPPOSITION

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BRIEF FOR RESPONDENT THE STATE OF ILLINOIS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Illinois, which was not reported, appears in Appendix B of the Petition. The opinion of the Court of Appeals for the Seventh Circuit is reported at 552 F.2d 768 and appears in Appendix A of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I

Whether an antitrust plaintiff is entitled to the disclosure of grand jury transcripts which have already been disclosed to and cross-delivered between civil corporate defendants in a prior criminal action where the demonstrated need for limited production to the plaintiff outweighs the residual need for secrecy.

II

Whether a decision denying access to certain grand jury transcripts entered in a Rule 6(e) proceeding by a district court other than the court of the main proceeding is a final, appealable order under 28 U.S.C. § 1291 where the decision terminates the proceedings in the district court and is not otherwise subject to review.

STATEMENT OF THE CASE

On December 19, 1972, an indictment filed in the United States District Court for the Eastern District of Illinois charged nine highway construction companies and four of their corporate officers with violating § 1 of the Sherman Act by submitting collusive bids to the State of Illinois. On January 22, 1973, during the pendency of the criminal action, Chief Judge Henry Wise ordered the Department of Justice to permit the defendants to inspect and copy the grand jury transcripts of present or former corporate employees who testified before the grand jury. While disclosure by the Department of Justice to some defendants can be documented, the record is unclear as to the extent of several additional disclosures made by the U. S. Attorney's office in Danville. Furthermore, at least one instance of cross-delivery between the defendants has been documented. Subsequently, all defendants were sentenced on pleas of *nolo contendere* and the grand jury was discharged.

On November 7, 1973, the State of Illinois filed a civil treble damage action in the Southern District of Illinois against the nine companies named in the Eastern District indictment, plus five other companies, to recover overcharges paid by the State as a result of the conspiracy to rig bids. The complaint alleged the same activities charged in the indictment.

On July 26, 1974, the State petitioned the Southern District for an order requiring the Department of Justice to produce for inspection and copying the grand jury transcripts which had been disclosed to the defendants in the criminal case. The State also filed a request on each of the defendants to produce the previously disclosed transcripts. On December 3, 1974, Judge Harlington Wood de-

nied both the petition and the request solely on the ground that the transcripts were outside the jurisdiction of the Southern District and within the jurisdiction of the Eastern District.

On December 22, 1975, the State instituted a proceeding in the Eastern District pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure entitled *Illinois* v. *Sarbaugh, In re Grand Jury Proceedings,* No. CR-72-67-D, U.S. District Court, Eastern District of Illinois, Danville Division (1976), to obtain an order directing John E. Sarbaugh, Chief of the Midwest Office, Antitrust Division, Department of Justice, and custodian of the transcripts, to produce to the State all transcripts which had been previously disclosed to the corporate civil defendants, their officers or agents, or to any witnesses before the grand jury. Chief Judge Henry Wise invited the corporate defendants in the civil action to participate in the Rule 6(e) proceeding. At the hearing on February 26, 1976, the defendants opposed disclosure.

On May 6, 1976, Judge Wise denied the State's petition for the production of the disclosed grand jury transcripts. Because the extent of disclosure could not be accurately documented, Judge Wise assumed in his order that disclosure had been made to each eligible defendant. (Pet. App. B 10).

On June 4, 1976, the State of Illinois filed a Notice of Appeal in the Eastern District, seeking review of that part of Judge Wise's order which denied the petition for the production of grand jury transcripts. The corporate defendants moved to dismiss the appeal on jurisdictional grounds. Subsequently, the State moved to strike the appearances and pleadings of the corporate defendants as-

serting that they were merely invited to participate as *amici curiae* in the Rule 6(e) proceeding and were not parties as of right on appeal.

The Court of Appeals for the Seventh Circuit reversed and remanded the decision of the Eastern District Court. *Illinois* v. *Sarbaugh,* 552 F.2d 768 (7th Cir. 1977). The Appellate Court ruled that the defendants in the civil action in the Southern District were intervenors in the Eastern District proceeding, the Rule 6(e) action was an independent proceeding, and the order of the district court denying access to the transcripts was a final appealable order. On the merits of the appeal, the Court of Appeals held that, in the balance, the need for limited and discreet disclosure to the State for use in the civil action outweighed the diminished secrecy of the transcripts caused by the prior disclosure to the corporate defendants, and cross-delivery among defendants. The court adopted several conditions and restrictions upon disclosure to further protect any remaining secrecy.

THE DECISION BELOW IS CORRECT

The Court of Appeals for the Seventh Circuit has judiciously followed the reasoning set out by this Court in *United States* v. *Procter & Gamble Co.,* 365 U.S. 677 (1958). The Circuit Court balanced the remaining need for continued secrecy of the transcripts against the positive need for disclosure to the State of Illinois. After detailed analysis of the specific facts of the case, the Seventh Circuit determined that the policy reasons justifying secrecy had been diminished, any remaining secrecy could be adequately safeguarded through the use of protective orders, and the State of Illinois had shown a compelling need commensurate with the degree of secrecy remaining.

The Seventh Circuit first noted that several of the policy reasons for secrecy were no longer applicable since the grand jury had been discharged and the criminal proceedings had been terminated.

With respect to the surviving reasons for continued secrecy, the Seventh Circuit correctly determined that disclosure of a witness' testimony before the grand jury to his employer diminished the need to protect the witness from reprisal by his employer. In addition, the "residual" need for secrecy based upon potential adverse effects on the witness' future relationship with other members of the industry could be adequately dealt with through a protective order.

The Court next emphasized that the existence of cross-delivery and the future need to cross-deliver among defense counsel further narrowed the remaining zone of secrecy and diluted what remained of the reasons for secrecy:

> [T]he need of joint defendants to cooperate in their common defense will often lead to further disclosures within the group of defendants in the criminal case and sometimes to those who may be added in the civil case . . . [W]hen transcripts are shared, however, the group of potential retaliators who do not know of the grand jury testimony is reduced and so is the importance of maintaining secrecy. 552 F. 2d at 775 (Pet. App. A. 12, 13).

Turning to the specific factors forming the compelling need for disclosure, the Seventh Circuit first observed that when a witness is required to testify publicly about matters previously dealt with in the grand jury, the court should permit the use of the earlier testimony "to assure the accuracy of his later testimony." 552 F. 2d at 776 (Pet. App. A 14).

As an additional need for disclosure, the Court noted that, though never decisive, a factor to be weighed was the unfairness of permitting one side of a lawsuit to have exclusive access to a storehouse of relevant facts. The court also considered that the lapse of time between the events in issue and the testimony the witnesses will give in deposition or trial was an additional factor enhancing the need for disclosure.

Finally the court determined that, under the circumstances of the case at bar, it was not necessary that the State first show an inconsistency between trial or deposition testimony and grand jury testimony. The court was concerned with the judicial waste which would attend the procedure whereby a party is required to first depose a witness; then approach the court for an *in camera* inspection; then request the district court judge to review the transcripts and determine specific instances of failure to recall, or identify impeaching material; and, if found, then to commence a second deposition so as to confront the witness with his prior testimony. The waste is more tragic under circumstances where the defendants already have the transcripts, and will know instantly during the course of deposition or trial testimony whether the transcripts have utility as impeaching or refreshing material without the need for an *in camera* inspection.

The Court of Appeals carefully reviewed each of the foregoing criteria, and struck the balance in favor of disclosure to the State where a witness is scheduled to testify at a deposition or trial, and where suitable protective orders are entered to assure that the disclosure is carefully limited without violating any of the "zones of secrecy" which might remain.

The Seventh Circuit's careful attention to protect whatever secrecy remained in the transcripts while permitting the State access to valuable prior testimony belies the Petitioners' contention that the Seventh Circuit has permitted "general discovery", without a showing of particularized need.

THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER COURTS OF APPEALS

In the exercise of this Court's "sound judicial discretion" under Rule 19 of the Rules of the United States Supreme Court, cases that do not involve important public issues or a real and embarrassing conflict of opinion and authority between the circuit courts of appeals are not a proper subject for review. *Layne and Bowler Corporation* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923); *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

Petitioners contend that the decision of the Court of Appeals for the Seventh Circuit is in conflict with other courts of appeals as to whether transcripts should be disclosed for purposes of "general discovery". Petitioners have once again waved the red flag of "general" discovery without addressing the specific test which must be applied, and which was applied by the Seventh Circuit in resolving the issue of production of grand jury transcripts. A closer examination reveals that the decision of the Seventh Circuit is not in conflict with other courts of appeals and review by this Court is not warranted.

Petitioners first argue that the Seventh Circuit has "adopted a position in direct conflict" with that taken by the Fifth Circuit in *Texas* v. *United States Steel Corporation*, 546 F.2d 626 (5th Cir. 1977). In support, Petitioners claim that the Seventh Circuit "recognized that its decision

was in conflict with decisions of other circuits", (Petition, p. 10), referring to footnote 15 of the opinion. (Pet. App. A 18). However, as the Seventh Circuit clearly indicates in the body of its opinion, the inconsistency referred to in the footnote is one of *result*, not a conflict in the law.

Thus, the Seventh Circuit stated:

> The Fifth Circuit did recognize that the state [of Texas] might well have some inspection rights but required it to "draw a finer bead," so the disparity in the results that would be reached by that court and ours may not be as great as it appears at first. 552 F. 2d at 778 (Pet. App. A 18).

While the results of each case are different, the Courts of Appeals are in accord with respect to each of the major overlapping legal questions raised by the cases.

First, the Courts of Appeals agree that they must balance the competing interests of the continuing need for secrecy and the positive need for disclosure. However, each court must exercise some degree of discretion in balancing the specific factors present in their respective cases. Thus, since different factors are present in each case, and are accorded varying weight by the courts, different results are reached.

The courts take divergent avenues from the beginning because of one factor not present in *Texas* but clearly present in the case at bar—the element of past and future cross-delivery among the defendants.

In *Sarbaugh*, the Seventh Circuit noted that cross-delivery had taken place, and might well take place in the future whenever it would be in the best interests of the defendants. Thus, said the Seventh Circuit, the remaining "zones of secrecy" were further diminished. See, 552 F. 2d at 775 (Pet. App. A 12, 13).

In *Texas*, however, the Fifth Circuit considered binding a voluntary agreement among defense counsel to the effect that transcripts in their possession would not be cross-delivered. While the Fifth Circuit may believe that such an agreement, which was obviously formed solely for the purpose of withholding discovery from the plaintiff, realistically protects the transcripts (the agreement is rescindable at any time by counsel), its decision on the point presents no conflict since it was never an issue before the Seventh Circuit.

Second, the Circuit Courts agree that particularized need must be shown. The Fifth Circuit characterizes the argument of the State of Texas as follows:

> The State of Texas' principal position here is that factual peculiarities in this case and the general policy favoring discovery distinguish the particularized need test of *Allis-Chalmers*, so that *no showing of such need* is requisite in this instance. A subsidiary argument is that the corporate defendants' discrete possession of portions of the relevant documents provides sufficient particularized need to justify discovery under *Allis-Chalmers*. The argument runs that only when grand jury secrecy is threatened does the particularized need test come into play and that only an attempt to discover the transcripts *from the grand jury* or those under the imposed silence of Fed. R. Crim. P. 6(e) significantly threatens grand jury secrecy. When the corporate defendants have the collective transcripts in their several possessions, Texas argues, that secrecy cannot be threatened because it has already been breached, and normal discovery rules should apply. 546 F. 2d at 629. (Emphasis supplied).

The Fifth Circuit refused to accept the argument that prior disclosure to the corporate defendants completely dispensed with the necessity of showing particularized need or of utilizing the balancing test of *Procter & Gamble*,

supra, and *Allis-Chalmers Manufacturing Co.* v. *City of Fort Pierce, Fla.*, 323 F.2d 233 (5th Cir. 1963). The Seventh Circuit is in complete harmony with that holding. The position advanced by the State of Illinois, and adopted in part by the Seventh Circuit, was that prior disclosure to the corporate defendants formed only a factor (though a significant one) to be weighed in the balance, as part of the compelling or particularized need. Even in the face of prior disclosure, the State of Illinois conceded that particularized need must be shown. See, 552 F.2d at 774 (Pet. App. A 11).

Third, the Circuit Courts agree that prior disclosure *standing alone* is not sufficient particularized need. In the case at bar, the Seventh Circuit expressly rejected the State's argument that prior disclosure to the corporate defendants alone lifted all secrecy of the transcripts. See, 552 F.2d at 775 (Pet. App. A 13).

The Fifth Circuit reached a similar result. In *Texas*, the court theorized that a witness who receives his own transcript is no different than a corporate employer which receives a transcript of its own employee. Without analyzing to what extent the need for secrecy was in effect diminished by the prior disclosure, the Fifth Circuit held that prior disclosure standing alone was not a sufficient showing of particularized need.

It is true that the Seventh Circuit does not agree with the analogy drawn by the Fifth Circuit. Indeed, as this Court stated in *Proctor & Gamble, supra*, one of the primary policy reasons for maintaining secrecy is to protect the employee by preventing the employer for whom the employee is a "spokesman" from reviewing his grand jury testimony. It is doubtful that the Fifth Circuit has taken the position that the disclosure to a corporation of its em-

ployee's transcript does not *in some way* diminish the need for maintaining the secrecy of the transcript. Rather, it is assumed that the analytical approach of the Fifth Circuit was to determine whether disclosure under such circumstances alone constituted a sufficient showing of particularized need.

Having determined that it did not, the Fifth Circuit chose not to consider other factors which may have tipped the balance in favor of disclosure. As the Seventh Circuit pointed out, a "finer bead" approach might have changed the result. However, the law applied by the Fifth Circuit does not present a "real and embarassing conflict" with the decision of the Seventh Circuit requiring review by this Court.

Petitioner also argues that the decision of the court below conflicts with *dicta* contained in the Second Circuit opinion in *Baker* v. *United States Steel Corporation,* 492 F.2d 1074 (2nd Cir. 1974). However, the Seventh Circuit distinguished *Baker* based upon the significant factual differences of the cases. Indeed, the Seventh Circuit actually found that the rationale of the *Baker* decision supported its opinion:

> The Second Circuit, in *Baker* v. *United States Steel Corp.,* [citation omitted], has said that grand jury secrecy should not be breached for general discovery purposes. Yet the court recognized that disclosure is appropriate
>
> > "to enable counsel to perform the vital function of cross-examining a witness who is obligated for other reasons to testify publicly with respect to the same matters which were the subject of his grand jury testimony"
>
> 492 F. 2d at 1079, citing, among other authorities, *State of Illinois* v. *Harper & Row Publishers, Inc.,*

> *supra,* 50 F.R.D. at 37. Our decision is consistent with the limitation and the quoted language. 552 F. 2d at 777 (Pet. App. A 17).

Thus *Baker* supplies no conflicting authority. Nor can it be said, as Petitioners have suggested, that the *Baker* court is in agreement with the Fifth Circuit in *Texas. Baker* is factually dissimilar from both *Sarbaugh* and *Texas* because there was no prior disclosure to the corporate defendants in *Baker.*

Finally, Petitioners argue that their Petition raises a significant federal question to be decided by this Court. As framed by the Petitioners, the supposedly important federal query is whether disclosure without a showing of need impairs the functioning of future grand juries. (See, Petition, p. 16). The answer to such an exaggerated question, is, of course, in the affirmative. However, that was never the question before the lower courts, and would not be an issue before this Court. The issue in the lower courts, rather, has been whether a civil litigant should be entitled to grand jury transcripts where the reasons for the secrecy of those transcripts are no longer viable, and any remaining secrecy in those transcripts can otherwise be protected. That issue was correctly decided by the Seventh Circuit and is harmonious with other Appellate Court decisions and myriad district court decisions.*

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* *U.S. Industries, Inc.* v. *United States District Court,* 345 F. 2d 18 (9th Cir. 1965), *cert. denied,* 382 U.S. 814 (1965); *In re Arizona Dairy Products Litigation,* 1976-1 Trade Cases ¶ 60,910, U.S. District Court, District of Arizona, No. CIV-74-569-A PHX-CAM; *In re Sugar Antitrust Litigation,* 1976-1 Trade Cases ¶ 60,934, U.S. District Court, Northern District of California, Master File No. MDL 201;

Petitioners also insist that a second important federal question is whether the disclosure of grand jury transcripts impermissibly hinders a criminal corporate defendant's right to employ discovery procedures, and its right to effective assistance of counsel. Petitioners raised this argument in both the District and Circuit Courts. Neither court found the argument persuasive and neither even mentioned the issue in passing in their lengthy opinions.

Petitioners' position, of course, presupposes that the policy reasons for the secrecy of grand jury testimony were designed to protect criminal defendants, which they were not, and that criminal corporate defendants have a "right" to the discovery of transcripts under Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure, which they do not. The chilling effect on a criminal defendants' employment of discovery is no different from many other decisions made by criminal defendants during the course of a criminal case, any of which may have an impact on later damage suits by the alleged victims of the unlawful conduct. The supposed burden on effective assistance of counsel has always been cast in vague terms by Petitioners. Nevertheless, it does not reach the constitutional proportions of *United States* v. *Jackson,* 390 U.S. 570 (1968).

In re Toilet Seat Antitrust Litigation, 1975-2 Trade Cases ¶ 60,557, U.S. District Court, Eastern District of Michigan, Southern Division, Master File No. 75-184; *In re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings,* 381 F. Supp. 1108 (N.D. Ill. 1974); *State of Connecticut* v. *General Motors Corp.,* 1974-2 Trade Cases ¶ 75,138, U.S. District Court, Northern District of Illinois, Eastern Division, No. 71 C 830 (MDL No. 65).

THE ORDER OF THE DISTRICT COURT WAS FINAL AND APPEALABLE

The Seventh Circuit has held that the Rule 6(e) proceeding initiated in the Eastern District Court of Illinois was an independent proceeding and that the order of the Eastern District denying access to the transcripts was a final appealable order under 28 U.S.C. § 1291. That decision does not conflict with any other federal court opinion, is in harmony with established principles of federal jurisdiction, and does not warrant review by this Court.

As well-explained by the court below, Rule 6(e) vests jurisdiction to release the transcripts solely in the Eastern District. "It is that court that has the responsibility for enforcing Rule 6(e) and maintaining the secrecy of grand jury proceedings" . . . where appropriate. 552 F. 2d at 773 (Pet. App. A 7). The conclusion is inescapable that the Rule 6(e) proceeding for disclosure of the transcripts is an independent proceeding. See, e.g., *United States* v. *Byoir,* 147 F. 2d 336 (5th Cir. 1945). Petitioners' claimed status as intervenors in the lower court proceeding only concedes and emphasizes the independent nature of that action.

The order of the Eastern District denying disclosure of the transcripts finalized all matters pending in that district, was not otherwise subject to review, and was immediately appealable under § 1291. *Carter Products, Inc.* v. *Eversharp, Inc.,* 360 F. 2d 868 (7th Cir. 1966); *Premium Service Corporation* v. *Sperry & Hutchinson Company,* 511 F. 2d 225 (9th Cir. 1975). The Seventh Circuit's rationale fully comports with the final order doctrine and is not questioned in the Petition.

Indeed, as noted by the Seventh Circuit and admitted by Petitioners, (Petition, p. 20-21), *denial orders* entered by a district court separate from the main proceeding are final decisions for the purposes of appeal, *Carter, supra; Premium, supra; Horizons Titanium Corporation* v. *Norton Company,* 290 F. 2d 421 (1st Cir. 1961); *Gibson* v. *United States,* 403 F. 2d 166 (D.C. Cir. 1968); 8 Wright & Miller, Federal Practice & Procedure, § 2006; 9 Moore's Federal Practice, ¶ 110.13[2], and may be distinguishable from orders *granting* disclosure. See, *Baker, supra,* at 1078.

The Petitioners proceed to ignore these fundamental principles of appellate jurisdiction and instead argue that the Eastern District's denial order is not yet final, but rather must be appealed later out of the Southern District. In support of this contention, the Petitioners make the curious argument that solely because both district courts are within the geographic boundaries of the same appellate circuit, the order may be appealed out of the Southern District. This wholly unsupported assertion is laid at the doorstep of this Court as the important question of federal jurisdiction worthy of review.

The fatal flaw of the Petitioners' novel argument is that they disregard the jurisdiction of the district court from which an appeal is taken. It is the jurisdiction of the district court, not the physical boundaries of a circuit, which defines and limits the jurisdiction of an appellate court to review a decision. The mere geographic location of a district court within a circuit does not automatically give rise to appellate jurisdiction. The courts of appeals can only review an issue over which the lower court had jurisdiction. *United States ex rel. Geach* v. *Ragen,* 231 F. 2d 455 (7th Cir. 1956); *Green* v. *Green,* 218 F. 2d 130 (7th Cir. 1954), *cert. denied,* 349 U.S. 917 (1955). As Judge Wood noted in

the Southern District and as confirmed by the Seventh Circuit, only the Eastern District has jurisdiction of the grand jury transcripts. The order denying disclosure of the transcripts thus could not be raised on appeal from the Southern District. Any other conclusion would require the Court of Appeals, in an appeal out of the Southern District, to rule on an issue over which the Southern District had no jurisdiction.

Petitioners cite *Baker* v. *United States Steel Corp., supra,* to support their "physical boundaries" theory. However, *Baker* did not involve or even discuss the theory. The *Baker* court held that the order *granting* disclosure was not appealable while recognizing that an order *denying* disclosure may well be immediately reviewed. Thus the finality found to exist by the court below is supported by both the Seventh Circuit's rationale and by the Second Circuit in *Baker,* although the Seventh Circuit's decision indicates that an order of the grand jury district court would be appealable regardless of whether production was granted or denied. Even assuming the rationale of the two Circuit Courts to be in slight disharmony, the result reached in this case would remain unchanged under either approach.

The Petitioners have failed to bring to this Court's attention a single case where the geographic boundaries of a circuit court have formed the basis of appellate jurisdiction. Moreover, the Petitioners admit that "[t]his Court has not had occasion to address itself to the issue of appealability presented in this Petition. . . ." (Petition, p. 19). Neither has any circuit court of appeals. Such novel questions of first impression are more properly left to the lower federal courts for their initial determination.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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